

# FEDERAL COURT OF AUSTRALIA

## Deputy Commission of Taxation v Wang [2019] FCA 1759

File number: VID 1147 of 2019

Judge: **DAVIES J**

Date of judgment: 28 October 2019

Catchwords: **PRACTICE AND PROCEDURE** – *ex parte* application for freezing and restraining orders – good arguable case on prospective causes of action in respect of substantial tax related liabilities – danger that prospective judgment will be wholly or partly unsatisfied – evidence of first respondent having history of making false and misleading statements with respect to liability to tax – means to remove assets through control of related corporate entities and trusts – power to make orders in respect of dealing with trust assets where beneficiary has effective control of trustee’s power to distribute trust benefits – application granted

Legislation: *Federal Court Rules 2011* (Cth) rr 7.32, 7.35  
*Income Tax Assessment Act 1997* (Cth) ss 5-5(7)  
*Taxation Administration Act 1953* (Cth) Sch 1 ss 255-5, 260-5, 298-15, 350-10

Cases cited: *Australian Securities and Investments Commission v Carey & Ors* (No 6) (2006) 153 FCR 509; [2006] FCA 814  
*Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth of Australia & Ors* (2019) 93 ALJR 807; [2019] HCA 20  
*Commissioner of Taxation v Barnes Development Pty Ltd* (2009) 178 FCR 352; [2009] FCA 830  
*Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146  
*Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473  
*Deputy Commissioner of Taxation v Vasiliades* (2014) 99 ATR 799; [2014] FCA 1250

Date of hearing: 25 October 2019

Registry: Victoria

Division:	General Division
National Practice Area:	Delete these rows - not required
Category:	Catchwords
Number of paragraphs:	21
Counsel for the Applicant:	Mr S Owen-Conway QC and Mr S Linden
Solicitor for the Applicant:	Australian Government Solicitor
Counsel for the First, Second, Third, Fourth, Fifth and Sixth Respondents:	The First, Second, Third, Fourth, Fifth and Sixth Respondents did not appear

## **ORDERS**

**VID 1147 of 2019**

**BETWEEN:**                **DEPUTY COMMISSIONER OF TAXATION**  
Applicant

**AND:**                    **MIN WANG**  
First Respondent

**LH 7 (SFM) PTY LTD (ACN 607 267 765)**  
Second Respondent

**LH 7 (168 VICTORIA) PTY LTD (ACN 605 322 781)** (and others  
named in the Schedule)  
Third Respondent

**JUDGE:**                **DAVIES J**

**DATE OF ORDER:**    **25 OCTOBER 2019**

### **THE COURT ORDERS THAT:**

1. A freezing order is made against the First Respondent in the terms specified in Annexure A.
2. Until 5:00 pm on 30 October 2019 or further order, the First Respondent must not herself, and must not through any partner, employee, agent or other person acting on her behalf or on her instructions:
  - (a) exercise or influence any power of distribution in respect of the Wang (SFM) Trust, the Wang (168 Victoria) Trust or the Wang (168 Victoria Development) Trust, including in her capacity as a director of any trustee of the trusts;
  - (b) exercise any power as appointor of the Wang (SFM) Trust, the Wang (168 Victoria) Trust or the Wang (168 Victoria Development) Trust.
3. Until 5:00pm on 30 October 2019 or further order, the Second, Third, Fourth, Fifth and Sixth Respondents, in their own right or as trustee of a trust, must not dispose of, encumber or deal with their assets other than in the ordinary course of business, and must not make any agreement to vary the terms of the Joint Venture Agreement and Development Agreement dated 18 November 2016 concerning the building development known as 'Swanston Central', without giving the Applicant at least

14 days' written notice. For the avoidance of doubt, the 'ordinary course of business' includes the sale and settlement of apartments in Swanston Central.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**Annexure A**

No. 1147 of 2019

Federal Court of Australia

District Registry: Victoria

Division: General

**Deputy Commissioner of Taxation**

Applicant

**Min Wang** and others named in the schedule

Respondents

**PENAL NOTICE**

**TO: MIN WANG, the First Respondent**

**IF YOU (BEING THE PERSON BOUND BY THIS ORDER):**

- (A) REFUSE OR NEGLECT TO DO ANY ACT WITHIN THE TIME SPECIFIED IN THIS ORDER FOR THE DOING OF THE ACT; OR**
- (B) DISOBEY THE ORDER BY DOING AN ACT WHICH THE ORDER REQUIRES YOU NOT TO DO,**

**YOU WILL BE LIABLE TO IMPRISONMENT, SEQUESTRATION OF PROPERTY OR OTHER PUNISHMENT.**

**ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS YOU TO BREACH THE TERMS OF THIS ORDER MAY BE SIMILARLY PUNISHED.**

**TO: MIN WANG, the First Respondent**

00000000This is a '*freezing order*' made against you on 25 October 2019 by Justice Davies at a hearing without notice to you after the Court was given the undertakings set out in Schedule A to this order and after the Court read the affidavits listed in Schedule B to this order.

## THE COURT ORDERS:

### INTRODUCTION

1. The application for this order is made returnable immediately.
  - (b) The time for service of the application, supporting affidavits and originating process is abridged and service is to be effected in the manner set out in the orders made by the Court on 25 October 2019.
2. Subject to the next paragraph, this order has effect up to and including 5:00 pm on 30 October 2019 (**the Return Date**). On the Return Date at 9:30 am on 30 October 2019 there will be a further hearing in respect of this order before Justice Davies.
3. Anyone served with or notified of this order, including you, may apply to the Court at any time to vary or discharge this order or so much of it as affects the person served or notified.
4. In this order:
  - (a) 'applicant', if there is more than one applicant, includes all the applicants;
  - (b) 'you', where there is more than one of you, includes all of you and includes you if you are a corporation;
  - (c) 'third party' means a person other than you and the applicant;
  - (d) 'unencumbered value' means value free of mortgages, charges, liens or other encumbrances.
5.
  - (a) If you are ordered to do something, you must do it by yourself or through directors, officers, partners, employees, agents or others acting on your behalf or on your instructions.
  - (b) If you are ordered not to do something, you must not do it yourself or through directors, officers, partners, employees, agents or others acting on your behalf or on your instructions or with your encouragement or in any other way.

### FREEZING OF ASSETS

6. You must not remove from Australia or in any way dispose of, deal with or diminish the value of any of your assets in Australia (**'Australian assets'**) up to the unencumbered value of AUD\$103,135,655.93 (**'the Relevant Amount'**).
  - (b) If the unencumbered value of your Australian assets exceeds the Relevant Amount, you may remove any of those assets from Australia or dispose of or deal with them or diminish their value, so long as the total unencumbered value of your Australian assets still exceeds the Relevant Amount.

- (c) If the unencumbered value of your Australian assets is less than the Relevant Amount, and you have assets outside Australia (**'ex-Australian assets'**):
  - (i) you must not dispose of, deal with or diminish the value of any of your Australian assets and ex-Australian assets up to the unencumbered value of your Australian and ex-Australian assets of the Relevant Amount; and
  - (ii) you may dispose of, deal with or diminish the value of any of your ex-Australian assets, so long as the unencumbered value of your Australian assets and ex-Australian assets still exceeds the Relevant Amount.

7. For the purposes of this order,

- (1) your assets include:
  - (a) all your assets, whether or not they are in your name and whether they are solely or co-owned;
  - (b) any assets which you have the power, directly or indirectly, to dispose of or deal with as if it were your own (you are to be regarded as having such power if a third party holds or controls the asset in accordance with your direct or indirect instructions); and
  - (c) the following assets in particular:
    - (i) the property known as 36 Normanby Street, Brighton, Victoria 3187, being the whole of the land in Certificate of Title Volume 6566 Folio 145 (**'the Property'**), or, if it has been sold, the net proceeds of the sale;
    - (ii) the 2014 Aston Martin registration number CZY;
    - (iii) the 2016 Rolls Royce registration number VHY789;
    - (iv) your loan receivable from LH 7 (SFM) Pty Ltd as trustee for the Wang (SFM) Trust being the sum of \$106,621,685.00;
- (2) the value of your assets is the value of the interest you have individually in your assets.

## PROVISION OF INFORMATION

8. Subject to paragraph 9, you must:

- (a) at or before the further hearing on the Return Date (or within such further time as the Court may allow) to the best of your ability inform the applicant in writing of all your assets world-wide, giving their value, location and details (including any mortgages, charges or other encumbrances to which they are subject) and the extent of your interest in the assets;

- (b) within 10 working days after being served with this order, swear and serve on the applicant an affidavit setting out the above information.
9. This paragraph (9) applies if you are not a corporation and you wish to object to complying with paragraph 8 on the grounds that some or all of the information required to be disclosed may tend to prove that you:
- (i) have committed an offence against or arising under an Australian law or a law of a foreign country; or
  - (ii) are liable to a civil penalty.
- (a) This paragraph (9) also applies if you are a corporation and all of the persons who are able to comply with paragraph 8 on your behalf and with whom you have been able to communicate, wish to object to your complying with paragraph 8 on the grounds that some or all of the information required to be disclosed may tend to prove that they respectively:
- (i) have committed an offence against or arising under an Australian law or a law of a foreign country; or
  - (ii) are liable to a civil penalty.
- (b) You must:
- (i) disclose so much of the information required to be disclosed to which no objection is taken; and
  - (ii) prepare an affidavit containing so much of the information required to be disclosed to which objection is taken, and deliver it to the Court in a sealed envelope; and
  - (iii) file and serve on each other party a separate affidavit setting out the basis of the objection.

#### **EXCEPTIONS TO THIS ORDER**

10. This order does not prohibit you from:
- (a) paying up to \$1,000 a week on your ordinary living expenses;
  - (b) paying your reasonable legal expenses;
  - (c) paying amounts to the applicant in respect of your taxation liabilities; and
  - (d) in relation to matters not falling within (a), (b), or (c), dealing with or disposing of any of your assets in discharging obligations bona fide and properly incurred under a contract entered into before this order was made, provided that, before



doing so you give the Applicant, if possible, at least two working days written notice of the particulars of the obligation.

11. You and the applicant may agree in writing that the exceptions in the preceding paragraph are to be varied. In that case the applicant or you must as soon as practicable file with the Court and serve on the other a minute of a proposed consent order recording the variation signed by or on behalf of the applicant and you, and the Court may order that the exceptions are varied accordingly.
12. This order will cease to have effect if you:
  - (i) pay the sum of AUD \$103,135,655.93 into Court or to the applicant; or
  - (ii) pay that sum into a joint bank account in the name of your lawyer and the lawyer for the applicant as agreed in writing between them; or
  - (iii) provide security in that sum by a method agreed in writing with the applicant to be held subject to the order of the Court.
  - (a) Any such payment and any such security will not provide the applicant with any priority over your other creditors in the event of your insolvency.
  - (b) If this order ceases to have effect pursuant to 12(a) above, you must as soon as practicable file with the Court and serve on the applicant notice of that fact.

## **COSTS**

13. The costs of this application are reserved to the Court hearing the application on the Return Date.

## **PERSONS OTHER THAN THE APPLICANT AND FIRST RESPONDENT**

### **14. Set off by banks**

This order does not prevent any bank from exercising any right of set off it has in respect of any facility which it gave you before it was notified of this order.

### **15. Bank withdrawals by the respondent**

No bank need inquire as to the application or proposed application of any money withdrawn by you if the withdrawal appears to be permitted by this order.

### **16. Persons outside Australia**

- (a) Except as provided in subparagraph (b) below, the terms of this order do not affect or concern anyone outside Australia.

- (b) The terms of this order will affect the following persons outside Australia:
- (i) You and your directors, officers, employees and agents (except banks and financial institutions);
  - (ii) any person (including a bank or financial institution) who:
    - (A) is subject to the jurisdiction of this Court; and
    - (B) has been given written notice of this order, or has actual knowledge of the substance of the order and of its requirements; and
    - (C) is able to prevent or impede acts or omissions outside Australia which constitute or assist in a disobedience of the terms of this order; and
  - (iii) any other person (including a bank or financial institution), only to the extent that this order is declared enforceable by or is enforced by a court in a country or state that has jurisdiction over that person or over any of that person's assets.

**17. Assets located outside Australia**

Nothing in this order shall, in respect of assets located outside Australia, prevent any third party from complying or acting in conformity with what it reasonably believes to be its bona fide and properly incurred legal obligations, whether contractual or pursuant to a court order or otherwise, under the law of the country or state in which those assets are situated or under the proper law of any contract between a third party and you, provided that in the case of any future order of a court of that country or state made on your or the third party's application, reasonable written notice of the making of the application is given to the applicant.

**18. Notices under s260-5 of Schedule 1 to the *Taxation Administration Act***

Nothing in this order shall prevent any third party complying with the terms of a notice issued by the Commissioner of Taxation to the third party pursuant to section 260-5 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) in respect of any money which the third party may owe or may later owe to the respondent.

## **SCHEDULE A**

### **UNDERTAKINGS GIVEN TO THE COURT BY THE APPLICANT**

- (1) The applicant undertakes to submit to such order (if any) as the Court may consider to be just for the payment of compensation (to be assessed by the Court or as it may direct) to any person (whether or not a party) affected by the operation of the order.
- (2) As soon as practicable, the applicant will file and serve upon the respondent copies of:
  - (a) this order;
  - (b) the application for this order for hearing on the return date;
  - (c) the following material in so far as it was relied on by the applicant at the hearing when the order was made:
    - (i) affidavits (or draft affidavits);
    - (ii) exhibits capable of being copied;
    - (iii) any written submission; and
    - (iv) any other document that was provided to the Court.
  - (d) a transcript, or, if none is available, a note, of any exclusively oral allegation of fact that was made and of any exclusively oral submission that was put, to the Court;
  - (e) the originating process, or, if none was filed, any draft originating process produced to the Court.
- (3) As soon as practicable, the applicant will cause anyone notified of this order to be given a copy of it.
- (4) The applicant will pay the reasonable costs of anyone other than the respondents which have been incurred as a result of this order, including the costs of finding out whether that person holds any of the first respondent's assets.
- (5) If this order ceases to have effect the applicant will promptly take all reasonable steps to inform in writing anyone to who has been notified of this order, or who he has reasonable grounds for supposing may act upon this order, that it has ceased to have effect.
- (6) The applicant will not, without leave of the Court, use any information obtained as a result of this order for the purpose of any civil or criminal proceedings, either in or outside Australia, other than this proceeding.

- (7) The applicant will not, without leave of the Court, seek to enforce this order in any country outside Australia or seek in any country outside Australia an order of a similar nature or an order conferring a charge or other security against the respondent or the respondent's assets.

**SCHEDULE B**

**AFFIDAVITS RELIED ON**

<b>Name of deponent</b>	<b>Date affidavit made</b>
(1) George Khouri	24 October 2019
(2) George Khouri	25 October 2019
(3) Andrew Ratnasingham	25 October 2019

**NAME AND ADDRESS OF APPLICANT'S LAWYERS**

The applicant's lawyers are:

Australian Government Solicitor,  
Level 34, 600 Bourke St, Melbourne, VIC 3000  
Email: Vincent.Tavolaro@ags.gov.au

## REASONS FOR JUDGMENT

**DAVIES J:**

1           On 25 October 2019 I heard an urgent *ex parte* application by the Deputy Commissioner of Taxation (“**DCT**”) for a freezing order against the first respondent (“**Ms Wang**”) as well as restraining orders against each of the respondents. At the conclusion of the hearing I made the orders sought and stated that I would provide written reasons. These are my reasons.

2           The power to make freezing orders is contained in r 7.32 of the *Federal Court Rules 2011* (Cth) which provides:

- (1)   The Court may make an order (a **freezing order**), with or without notice to a respondent, for the purpose of preventing the frustration or inhibition of the Court's process by seeking to meet a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied.
- (2)   A freezing order may be an order restraining a respondent from removing any assets located in or outside Australia or from disposing of, dealing with, or diminishing the value of, those assets.

3           Rule 7.35 deals with the circumstances in which the Court may make a freezing order against a prospective judgment debtor and a person other than a prospective judgment debtor. It relevantly provides:

- (1)   This rule applies if:
  - (a)   ...
  - (b)   an applicant has a good arguable case on an accrued or prospective cause of action that is justiciable in:
    - (i)   the Court; or
    - (ii)   ....
- (2)   ...
- (3)   ...
- (4)   The Court may make a freezing **order** or an ancillary order or both against a ... prospective judgment debtor if the Court is satisfied, having regard to all the circumstances, that there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because any of the following might occur:
  - (a)   ...;
  - (b)   the assets of the judgment debtor, prospective judgment debtor or another person are:

- (i) removed from Australia or from a place inside or outside Australia; or
  - (ii) disposed of, dealt with or diminished in value.
- (5) The Court may make a freezing [order](#) or an ancillary order or both against a person other than a ... prospective judgment debtor (a **third party** ) if the Court is satisfied, having regard to all the circumstances, that:
  - (a) there is a danger that a ... prospective judgment will be wholly or partly unsatisfied because:
    - (i) the third party holds or is using, or has exercised or is exercising, a power of disposition over assets (including claims and expectancies) of the judgment debtor or prospective judgment debtor; or
    - (ii) the third party is in possession of, or in a position of control or influence concerning, assets (including claims and expectancies) of the ... prospective judgment debtor; or
  - (b) a process in the Court is or may ultimately be available to the applicant as a result of ... prospective judgment, under which process the third party may be obliged to disgorge assets or contribute toward satisfying the judgment or prospective judgment.
- (6) Nothing in this rule affects the power of the Court to make a freezing order or ancillary order if the Court considers it is in the interests of justice to do so.

4           The DCT's application was supported by two affidavits of Mr George Khouri, a senior technical leader in the significant debt management team at the Australian Taxation Office, and an affidavit of Mr Andrew Ratnasingham, an employee of the Australian Taxation Office.

***Whether a good arguable case on prospective cause of action***

5           On 25 October 2019, the DCT served Ms Wang with notices of amended assessment of income tax and notices of assessment of administrative penalties for the years ended 30 June 2015 and 30 June 2016 totalling \$103,135,655.93. Pursuant to s 5-5(7) of the *Income Tax Assessment Act 1997* (Cth) and s 298-15 of Sch 1 to the *Taxation Administration Act 1953* (Cth) ("**TAA**"), the taxation liabilities under those assessments are payable, but not yet due. However, once due, the DCT may sue for recovery of the amount of the tax liabilities as debts due to the Commonwealth and payable to the Commissioner of Taxation: s 255-5 of Sch 1 of the TAA. By s 350-10 of Sch 1 to the TAA, the production of copies of the assessments in debt recovery proceedings will be conclusive evidence that the assessments were properly made and the amounts and particulars of the assessments are correct. The effect of s 350-10 is that Ms Wang cannot in such recovery proceedings contest her liability to pay the tax as assessed: *Commissioner of Taxation v Futuris Corporation Limited* (2008)

237 CLR 146 at [23]-[25] and [64]-[68] (Gummow, Hayne, Heydon and Crennan JJ); *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473 at 491-493 [40]-[45] (Gummow A-CJ, Heydon, Crennan and Kiefel JJ). I was accordingly satisfied that the DCT has a good arguable case on prospective causes of action against Ms Wang in respect of those tax related liabilities.

***Whether there is a danger that a prospective judgment will be wholly or partly unsatisfied***

6 I was also satisfied on the available evidence that the circumstances in which the Court may make a freezing order as prescribed by r 7.35(4) and (5) were made out on the available evidence.

7 By way of background, Ms Wang and her husband, Mr Liang Chen (“**Mr Chen**”), are property developers in China. They have operated their property development business through a group of companies in China known as the Shandong Hengyi Group. In 2010 Ms Wang commenced property development in Australia and in March 2014, Ms Wang, Mr Chen and their children were granted Australian Business Skills – Business Talent (Permanent) visas. According to Ms Wang’s income tax returns, she has been an Australian tax resident from and including the income year ended 30 June 2015 onwards. Mr Chen continues to reside in China.

8 Ms Wang is the sole director and shareholder of the second respondent (“**LH 7 (SFM)**”). LH 7 (SFM) is the trustee for the Wang (SFM) Trust (“**SFM Trust**”). The SFM Trust is a discretionary trust with a non-exhaustive list of general beneficiaries. Ms Wang is the primary beneficiary and appointor. Under clauses 20 and 21 of the SFM Trust deed, Ms Wang as the appointor has the power to remove and appoint the trustee and to nominate a successor to the position of appointor.

9 Ms Wang and her son, Ziyang Chen, are the directors of the third respondent (“**LH 7 (168 Victoria)**”). Ms Wang is the sole shareholder. LH 7 (168 Victoria) is the trustee of the Wang (168 Victoria) Trust, a discretionary trust of which Ms Wang is the primary beneficiary and appointor. The Wang (168 Victoria) Trust deed contains clauses in the same terms as clauses 20 and 21 of the SFM Trust.

10 Ms Wang and her son, Ziyang Chen, are also the directors of the fourth respondent (“**LH 7 (168 Victoria Development)**”). Ms Wang is the sole shareholder. LH 7 (168 Victoria Development) is trustee for the Wang (168 Victoria Development) Trust, another



discretionary trust of which Ms Wang is primary beneficiary and appointor. The Wang (168 Victoria Development) Trust deed also contains clauses in the same terms as clauses 20 and 21 of the SFM Trust.

11           LH 7 (168 Victoria Development) holds 80% of the shares in the sixth respondent (“**Hengyi (Swanston Central Developments)**”), the nominee for the joint venturers in a property development known as the Swanston Central property development. LH 7 (168 Victoria Development) is one of the joint venture parties.

12           The fifth respondent (“**Hengyi (Swanston Central)**”) is the land owner under the joint venture agreement. Ms Wang is one of the directors. LH 7 (168 Victoria) holds 80% of the shares in Hengyi (Swanston Central).

13           There are a number of reasons for being satisfied that there is a real risk of dissipation of assets.

14           First although Ms Wang is resident in Australia, she continues to have strong ties with China in that her husband, Mr Chen, continues to reside in China and carries on business there.

15           Secondly, the amount of tax liability is very significant in circumstances where she has both the means and the motive to remove assets because of her control of each of the corporate entities and of the trusts of which those corporate entities are trustees.

16           Thirdly, there is evidence that Ms Wang made false statements in her income tax returns for the 2014 and 2015 income years about her interests in China by representing that she did not have assets located outside Australia with a total value of more than \$50,000 and did not have an interest in any controlled foreign company, when information obtained by the Australian Taxation Office in the course of its review and audit of Ms Wang’s taxation affairs for those income years showed that in the 2014 income year, Ms Wang held shares in three foreign companies (Shandong Hengyi Investment Co Ltd (“**Shandong**”), Weifang Hengyi Property Co Ltd and Changyi Liyang Commercial Development Co Ltd) and, in the 2015 income year, continued to hold shares in Shandong, and that her shareholdings in those years were worth substantially more than \$50,000 at the time. There is also evidence that Ms Wang gave misleading information to the Australian Taxation Office concerning the funding of the purchase and development of the property at 199 William Street, Melbourne by Hengyi Australia Pty Ltd, a company of which Ms Wang is a sole director and shareholder.

17           Fourthly, the evidence discloses that Ms Wang has experience in international financial dealings and a history of transferring assets and liabilities between related parties. She also has a history of not putting commercial agreements between related parties into writing.

18           These considerations collectively provided a sufficient basis on which to be satisfied that there is a danger that assets may be dissipated in order to frustrate recovery.

***Power to make orders in respect of dealings in trusts assets***

19           The orders sought included a restraining order against Ms Wang from exercising or influencing any power of distribution in respect of the SFM Trust, the Wang (168 Victoria) Trust and the Wang (168 Victoria Development) Trust, including in her capacity as a director of any trustee of the trusts and when exercising any power as appointor under those three trusts. As well, a restraining order was sought against the second to sixth respondents in their own right or as trustee of a trust from disposing of, encumbering or dealing with their assets other than in the ordinary course of business, without giving the DCT at least 14 days' written notice.

20           As each of the trusts in question are discretionary trusts, there is a question as to whether Ms Wang has a sufficient interest in the assets of those trusts to support the orders sought. Senior counsel for the DCT brought to my attention a number of authorities on that question. It is fair to say that the law is not finally settled but the decision in *Australian Securities and Investments Commission v Carey & Ors (No 6)* (2006) 153 FCR 509; [2006] FCA 814 is strong authority supporting the proposition that the power exists in the present case. In that case, French J (as his Honour then was) held that the beneficiary who effectively controls the trustee's power of selection because he or she is the trustee and/or has the power to appoint a new trustee has something approaching a general power and the ownership of the trust property because "it is as good as certain" that the beneficiary will receive the benefits of distributions either of income or capital or both: at [29], [36]-[37], [41]. In *Deputy Commissioner of Taxation v Vasiliades* (2014) 99 ATR 799; [2014] FCA 1250, Gordon J applied French J's reasoning to conclude that the Commissioner had a good arguable case that the taxpayer in that case had a contingent interest of the kind identified by French J sufficient to found a restraining order against the taxpayer from exercising any power of distribution in respect of the trust including any power as a director of any trustee of the trust. In the present case, the evidence shows that Ms Wang is a beneficiary who controls each of

the trusts both through her control of the corporate trustees and through her power of appointment under the trusts. Accordingly, on the strength of those authorities, I was satisfied that there is a good arguable case that the orders sought could be made.

21           Additionally, if it be necessary, the DCT also relies on r 7.35(5)(b). The DCT intends to issue a garnishee notice under s 260-5 of Sch 1 to the TAA to the trustee for the (SFM) Trust in respect of Ms Wang's taxation liability. That notice will create a right in the DCT to sue the trustee in debt to recover the amount that is required to be paid by the notice when the time for payment of that amount as specified in s 260-5(5) has arrived: *Commissioner of Taxation v Barnes Development Pty Ltd* (2009) 178 FCR 352; [2009] FCA 830 (Gilmour J) at [35]. The trustee for the SFM Trust will have a right to be indemnified out of the assets of the trust, including any debts owing to it by the trustees for the Wang (168 Victoria) Trust and the Wang (168 Victoria Development) Trust in respect of liabilities incurred in the course of acting as trustee of the trust: *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth of Australia & Ors* (2019) 93 ALJR 807; [2019] HCA 20 at [29], [83] and [130]. There is evidence that the assets of the SFM Trust include a loan receivable as at 30 June 2018 from the Wang (168 Victoria) Trust of \$68,369,256. Accordingly by that route the trustee of the Wang (168 Victoria) Trust may be required to disgorge funds to satisfy the taxation debt.

I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Davies.

Associate:

Dated:     28 October 2019

## **SCHEDULE OF PARTIES**

**VID 1147 of 2019**

**Respondents**

Fourth Respondent:

**LH 7 (168 VICTORIA DEVELOPMENT) PTY LTD  
(ACN 605 389 955)**

Fifth Respondent:

**HENGYI (SWANSTON CENTRAL) PTY LTD  
(ACN 606 191 717)**

Sixth Respondent:

**HENGYI (SWANSTON CENTRAL  
DEVELOPMENTS) PTY LTD (ACN 606 236 033)**